

146 FERC ¶ 61,193
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Acting Chairman;
Philip D. Moeller, John R. Norris,
and Tony Clark.

Hydrodynamics Inc., Montana Marginal Energy, Inc., WINData, LLC	Docket No.	EL13-73-000
Hydrodynamics, Inc.	Docket Nos.	QF85-212-001 QF08-556-001 QF08-557-001 QF08-558-001 QF08-559-001 QF08-598-001
Montana Marginal Energy, Inc.	Docket No.	QF03-36-001
Two Dot Wind Energy, LLC	Docket Nos.	QF03-127-001 QF04-87-001
Two Dot Wind, LLC	Docket No.	QF04-157-001
Two Dot Wind Farm, LLC	Docket No.	QF10-668-001
Mo Wind, LLC	Docket No.	QF05-140-001
Greenfield Wind, LLC	Docket No.	QF11-449-002
Fairfield Wind LLC	Docket No.	QF11-450-003
Greenfield Wind II, LLC	Docket No.	QF13-425-001
Coyote Wind LLC	Docket No.	QF13-421-001

NOTICE OF INTENT NOT TO ACT AND DECLARATORY ORDER

(Issued March 20, 2014)

1. On June 17, 2013, Hydrodynamics Inc. (Hydrodynamics), Montana Marginal Energy, Inc. (Montana Marginal Energy), and WINData, LLC (WINData) (collectively,

Energy and Telecommunications Meeting
March 21, 2014

Petitioners) submitted a Petition for Enforcement and Declaratory Order (Petition) pursuant to section 210(h)(2)(A) of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ requesting that the Commission take enforcement action, or, in the alternative, issue a declaratory order finding that A.R.M. § 38.5.1902(5)² and orders interpreting that rule issued by the Montana Public Service Commission (Montana Commission) fail to implement the rights set forth under PURPA and Commission regulations regarding legally enforceable obligations, and sales of energy and capacity between qualifying facilities (QFs) and utilities.

2. Notice is hereby given that the Commission declines to initiate an enforcement action pursuant to section 210(h)(2)(A) of PURPA. Our decision not to initiate an enforcement action means that Petitioners may bring an enforcement action against the Montana Commission in the appropriate court.³ While we have chosen not to initiate an enforcement action, we find it appropriate to further comment on the matters at issue.

I. Background

3. Hydrodynamics states that it owns or operates four self-certified hydroelectric QFs located in Montana, totaling approximately 4.8 MW nameplate capacity.⁴ Montana Marginal Energy states that it owns or has an interest in several wind-powered QFs, also totaling approximately 4.8 MW of nameplate capacity.⁵ WINData is a Montana corporation owned by Martin Wilde (Wilde). Wilde is the managing member of a number of proposed QF projects including Coyote Wind, LLC (Coyote Wind), which is a proposed 80 MW wind-powered QF.⁶ Petitioners state that each of the existing and

¹ 16 U.S.C. § 824a-3(h)(2)(A) (2012).

² Administrative Rule of Montana § 38.5.1902(5) (2007) (Montana Rule).

³ 16 U.S.C. § 824a-3(h)(2)(B) (2012).

⁴ Petition at 12. The four Hydrodynamics QF projects in Montana are South Dry Creek, Lower South Fork, Strawberry Creek, and Flint Creek.

⁵ Petition at 13. Montana Marginal Energy is in the process of developing the following projects: Two Dot Wind Farm, LLC, Greenfield Wind, LLC, and Fairfield Wind, LLC.

⁶ Petition at 14. In addition to Coyote Wind, Wilde is the managing member of Greenfield Wind, LLC, and Greenfield Wind II, LLC.

planned facilities connect with, or will connect with, NorthWestern Corporation's (NorthWestern) transmission or local distribution systems.

4. Under section 292.304(d)(2) of the Commission's regulations,⁷ QFs have the option either:

(1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or

(2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:

(i) The avoided costs calculated at the time of delivery; or

(ii) The avoided costs calculated at the time the obligation is incurred.

5. In 1992, as part of its implementation of PURPA, the Montana Commission amended the Montana Rule to adopt a competitive solicitation approach for QFs with a threshold size greater than 3 MW of nameplate capacity.⁸ The Montana Rule was later amended in 2007 to increase the threshold amount to 10 MW of nameplate capacity.⁹

6. Currently, under the Montana Rule, a QF larger than 10 MW can only receive a long-term contract for energy and capacity by winning a competitive solicitation. Otherwise, the Montana Rule dictates that a QF can only sell power at avoided cost rates under a short-term agreement.¹⁰ The Montana Rule thus states:

⁷ 18 C.F.R. § 292.304(d)(2)(2013).

⁸ Montana Commission Answer at 6.

⁹ Petition at 17-18 & n.54.

¹⁰ Montana Commission Answer at 6.

All purchases and sales of electric power between a utility and a qualifying facility shall be accomplished according to the terms of a written contract between the parties or in accordance with the standard tariff provisions as approved by the commission. A long-term contract for purchases and sales of energy and capacity between a utility and a qualifying facility greater than 10MW in size shall be contingent upon selection of the qualifying facility by a utility through an all-source competitive solicitation conducted in accordance with the provisions of ARM 38.5.2001 through 38.5.2012. Between competitive solicitations, purchases and sales of energy and capacity between a utility and a qualifying facility greater than 10MW in size shall be accomplished in accordance with the short-term standard avoided cost tariff approved by the commission or through negotiation of a short-term written contract. The utility shall recompute [sic] the short-term and long-term standard tariffed avoided cost rates following public review and comment on each least cost plan filing, ARM 38.5.2001 through 38.5.2012. The recomputed avoided cost rates should reflect any amendments to the plan due to the comments of the commission and the public. If the qualifying facility is not selected, or does not participate, in the first available competitive solicitation, purchases and sales of energy and capacity shall continue only according to the terms of a newly negotiated short-term written contract or in accordance with the newly computed, short-term standard tariffed avoided cost rates. Long-term contracts for purchases and sales of energy and capacity between a utility and a qualifying facility 10MW or less may be accomplished according to standard tariffed rates as approved by the commission.

7. In 2006, the Montana Commission issued an order requiring NorthWestern to establish a cumulative installed capacity limit of 50 MW in its tariff applicable to QFs, Electric Tariff Schedule No. QF-1.¹¹ In 2010, the 50 MW installed capacity limit was

¹¹ *In the Matter of NorthWestern Energy*, Consolidated Docket Nos. D2003.7.86, D2004.6.96, D2005.6.103 (Montana Commission December 19, 2006) (Order No. 6501f) at P 193) *order on reconsideration*, (Montana Commission June 7, 2007) (Order No. 6501g) (finding that “the long-term, standard rate options must be available to QFs 10 MW or less,” and establishing “a 50 MW installed capacity limit on new QFs entering contracts under the long-term standard rate options.”). The Montana Commission further stated that once the 50 MW installed capacity limit is reached, it would consider whether to review its QF policies.

eliminated for non-wind QFs, but remained for wind QFs.¹² The 50 MW installed capacity limit for wind QFs was eliminated by Montana Commission order in 2012.¹³ In April 2013, however, the Montana Commission granted a stay of that order, pending appeal. Thus, presently, there is a 50 MW installed capacity limit for wind QFs, which applies to the cumulative purchases of all wind QFs greater than 100 kW but equal to or below 10 MW.

II. Petition for Declaratory Order

8. Petitioners challenge the Montana Commission's implementation of PURPA, stating that the Montana Rule is an unreasonable barrier to forming a legally enforceable obligation, given the Montana Commission's decisions interpreting the Montana Rule.¹⁴

¹² Petition at 17 (citing *In the Matter of NorthWestern Energy's Application for Approval of Avoided Cost Tariff for New Qualifying Facilities*, Docket No. D2008.12.146 (Montana Commission May 6, 2010) (Order No. 6973d) at P 150) (finding that "[t]he 50 MW installed capacity limit will remain for wind QFs in order to mitigate ratepayer risks related to uncertainty regarding actual wind resource costs, CO₂ costs and wind integration costs.").

¹³ *Id.* (citing *In the Matter of the NorthWestern Energy's Application for Approval of Avoided Cost Tariff for New Qualifying Facilities*, Docket No. D2012.1.3 at P 75 (Montana Commission December 7, 2012) (Order No. 7199d)) (stating that "[t]he main purpose of the 50 MW installed capacity limit has been to balance the inherent uncertainty in determining long-term avoided costs, including integration costs, with the goal of encouraging long-term contracts based on avoided cost," and concluding that, while the impact of wind development on NorthWestern's need for integration services presented an unknown risk of higher costs, particularly when NorthWestern relied on other utilities to provide integration service, a 2011 Montana Wind Integration Study and the NorthWestern's construction of the Dave Gates Generating Station with 105 MW of regulating capability "reduced these risks enough for a reasonable balancing of customer and QF interests without an on-going installed capacity limit.").

¹⁴ Whitehall Wind had petitioned the Montana Commission for relief after NorthWestern refused to negotiate a long-term power purchase contract with Whitehall Wind. In response, the Montana Commission held that Whitehall Wind was only entitled to a short-term avoided cost rate because it had not won a competitive solicitation. It also found that Whitehall Wind had failed to make an "unconditional commitment" to sell its energy and capacity to NorthWestern and therefore had not incurred a legally enforceable obligation, stating that "the touchstone of a legally enforceable obligation or LEO is an

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Petitioners argue that the Montana Rule requires QFs with an installed capacity greater than 10 MW to win a competitive solicitation in order to obtain long-term avoided cost rates under NorthWestern's Electric Tariff Schedule No. QF-1, and that such a QF cannot obtain a legally enforceable obligation because NorthWestern does not hold competitive solicitations. Petitioners argue that, because only one all-source competitive solicitation has occurred since 2002, and no rule prescribes that such solicitations must occur, the Montana Rule effectively eliminates a QF's right to obtain a legally enforceable obligation under 18 C.F.R. § 292.304(a), even through other means such as negotiation.¹⁵ Additionally, according to Petitioners, the all-source competitive solicitation discriminates against QFs because only QFs greater than 10 MW are subject to the requirement of winning a competitive solicitation. Moreover, Petitioners claim that NorthWestern routinely acquires generation outside of all-source competitive solicitations.¹⁶

9. Petitioners argue that the 50 MW installed capacity limit on wind QFs 10 MW or smaller essentially removes any path for a wind QF to obtain a long-term avoided cost rate, unless the QF is 100 kW or smaller.¹⁷ According to Petitioners, NorthWestern has signaled that it will not be purchasing any QF wind generation over 100 kW because it has already acquired 50 MW of wind QF generation.¹⁸

10. Petitioners state that the 50 MW installed capacity limit on wind, in conjunction with the Montana Rule, frustrates PURPA's goal of promoting the development of QFs. Petitioners state that the "[Montana Commission's] actions, taken together have completely and utterly chilled QF development in Montana and effectively permitted

absolute, unconditional commitment to deliver energy, capacity, or energy and capacity at a future date." The Montana Commission went on: "[t]o establish an LEO, a QF must tender an executed power purchase agreement to the utility... and an executed interconnection agreement. The executed contract demonstrates an unconditional commitment." *In the Matter of the Petition of Whitehall Wind, LLC, for QF Rate Determination*, Docket No. D2002.8.100 (Montana Commission June 4, 2010) (Order No. 6444e).

¹⁵ Petition at 20, 25.

¹⁶ *Id.* at 19, 27.

¹⁷ *Id.* at 28.

¹⁸ *Id.* at 28-29.

NorthWestern to block entry to any new QFs in Montana with an installed capacity larger than 10 MW and any wind QFs with an installed capacity greater than 100 kW.”¹⁹

Petitioners state that the “as available,” short-term rate does not permit a QF or its investors to obtain the financing that would be available with forecasted avoided cost pricing.²⁰

11. Petitioners request that the Commission pursue enforcement action against the Montana Commission under section 210(h) of PURPA because the Montana Rule, the 50 MW installed capacity limit on wind, and a Montana Commission decision interpreting these rules fail to implement PURPA.²¹ In the alternative, Petitioners request that the Commission issue a declaratory order explaining that the Montana Commission’s implementation of PURPA is improper and inconsistent with the Commission’s regulations.²²

A. Notice of Filing and Responsive Pleadings

12. Notice of the Petition was published in the *Federal Register*, 78 Fed. Reg. 38,028 (2013), with interventions and protests due on or before July 8, 2013, later extended to July 19, 2013. The Montana Commission filed a notice of intervention, an answer and a motion to dismiss. Timely motions to intervene and protests were filed by the Montana Consumer Counsel, Edison Electric Institute (EEI), National Association of Regulatory Utility Commissioners (NARUC), and NorthWestern. Petitioners filed an answer to the protests on August 9, 2013.

1. Montana Commission’s Answer

13. The Montana Commission states that, in Montana, QFs of any size can obtain a legally enforceable obligation by winning a competitive solicitation or negotiating with a

¹⁹ *Id.* at 29-30.

²⁰ *Id.* at 3.

²¹ *Id.* at 3, 7, 18.

²² *Id.* at 33.

utility.²³ The Montana Commission argues that its implementation of PURPA is not to blame for failed attempts by QFs over 10 MW to obtain long-term contracts.²⁴

14. The Montana Commission describes NorthWestern's Electric Tariff Schedule No. QF-1 filed with the Montana Commission.²⁵ The Montana Commission explains that NorthWestern offers long-term contracts ranging from 19 months to 25 years under Option 1(c) to wind QFs 10 MW and under, subject to a 50 MW installed capacity limit for QFs over 100 kW. The Montana Commission explains that QFs under 10 MW may also seek long-term, energy-only contracts up to 25 years under Option 2(a) or Option 2(b). Finally, the Montana Commission states that QFs, whether over or under 10 MW, may request short-term contracts under Option 1(b), Option 2(a), and Option 2(b).²⁶

15. The Montana Commission argues that the Montana Rule does not violate PURPA because the Commission has specifically supported competitive solicitations. The Montana Commission points to language in a Commission notice of proposed rulemaking that stated:

²³ Montana Commission Answer at 2.

²⁴ *Id.*

²⁵ Electric Tariff Schedule No. QF-1 provides the rate options available to QFs for sales to NorthWestern.

Option 1(a) is a long-term power purchase agreement available to non-wind QFs greater than 10 MW; it provides fixed, forecasted avoided cost rates for sales of energy and capacity. *Option 1(b)* is a fixed-rate, energy-only short-term power purchase agreement available to all QFs. *Option 1(c)* is a long-term power purchase agreement available only to wind QFs 10 MW or less; it provides fixed, forecasted avoided cost rates for sales of energy and capacity.

Options 2(a) and 2(b) are energy-only power purchase agreements up to 25 years with variable, market-based rates. The rate for Option 2(a), updated monthly, is based on NorthWestern's highest actual cost of 25 MWh purchases in the Mid-Columbia market in each hour. The rate for Option 2(b) is updated daily, and is based on the published Intercontinental Exchange Mid-Columbia index price for heavy load hours and light load hours.

²⁶ *Id.* at 6-7 (citing NorthWestern's Electric Tariff Schedule No. QF-1).

The purpose of this proposed rule is to permit bidding programs that would accurately establish utilities' avoided cost. To accomplish this goal, the Commission proposes to amend its current regulations to establish conditions and to provide specific guidance to the state regulatory authorities and nonregulated electric utilities on the use of bidding programs to set avoided costs. This proposed rule sanctions the use of bidding as a procedure for purchasing electricity from QFs.²⁷

The Montana Commission cites the many benefits of competitive bidding, including an increased likelihood the utility will select the least cost option for meeting future electricity demand, flexibility and responsiveness to changing market conditions, and better matching of a utility's capacity additions and capacity needs.²⁸

16. The Montana Commission argues that the infrequency with which competitive solicitations are held does not violate PURPA.²⁹ The Montana Commission cites Commission precedent that states that "there is no obligation under PURPA for a utility to pay for capacity that would displace its existing capacity arrangements."³⁰

17. The Montana Commission argues further that competitive bidding processes exist in other states such as Maine, Colorado, and Pennsylvania, pointing out that a lack of QF success, or increased difficulty in gaining long-term contracts, does not mean competitive bidding violates PURPA.³¹ The Montana Commission also argues that there is no requirement under PURPA that all of a utility's procurement must occur through competitive solicitations.³²

²⁷ *Id.* at 15 (citing *Regulations Governing Bidding Programs*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,455 (1988) (*Bidding NOPR*)).

²⁸ *Id.*

²⁹ *Id.* at 17.

³⁰ *Id.* (citing *City of Ketchikan, Alaska*, 94 FERC ¶ 61,293, at 62,061 (2001) (*Ketchikan*)).

³¹ Montana Commission Answer at 19-22.

³² *Id.* at 23.

Docket No. EL13-73-000, *et al.*

18. Lastly, the Montana Commission states that the 50 MW installed capacity limit is lawful, arguing that the Montana Commission has the right to eliminate the standard rates for purchases from QFs over 100 kW.³³ The Montana Commission claims that the 50 MW installed capacity limit applied to wind QFs is not discriminatory because wind resources are not similarly situated to other generators and need not be treated alike in all respects.³⁴

2. NorthWestern Protest

19. NorthWestern first challenges whether Petitioners have standing to complain that the Montana Commission's rules and decisions violate PURPA.³⁵ NorthWestern argues that Petitioners are not aggrieved by the Montana Rule because that rule applies only to QFs larger than 10 MW, and Petitioners are therefore not subject to the rule. NorthWestern states that, although the proposed 80 MW Coyote Wind QF would be subject to the rule, Coyote Wind has not taken the steps required to obtain a legally enforceable obligation at a long-term avoided cost rate. Thus, NorthWestern states that WINData, which has proposed building Coyote Wind, is not suffering harm and cannot reasonably expect to suffer harm from the competitive bidding requirement; therefore, the Commission should not entertain the Petition.

20. With respect to the 50 MW installed capacity limit, NorthWestern argues that this limit does not alter NorthWestern's duty to purchase all energy from wind QFs under PURPA, and that NorthWestern is committed to fulfilling this duty.³⁶ NorthWestern contends that the 50 MW installed capacity limit only affects the rates that a wind QF would be entitled to receive, and that a wind QF would not be able to receive a long-term forecast rate under Option 1(c). Thus, NorthWestern states that wind QFs subject to the 50 MW installed capacity limit would still be paid a fixed or market-based energy price, but would not receive compensation for capacity. NorthWestern states that these practices are supported by Commission precedent in *Ketchikan*.³⁷

³³ *Id.* at 31.

³⁴ *Id.* at 31-32.

³⁵ NorthWestern Protest at 7.

³⁶ *Id.* at 14.

³⁷ "A qualifying facility may seek to have a utility purchase more energy or capacity than the utility requires to meet its total system load. In such a case, while the utility is legally obligated to purchase any energy or capacity provided by a qualifying

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21. NorthWestern also argues that the Commission approved the use of competitive bidding for QFs in *Southern California Edison Company*.³⁸ Furthermore, NorthWestern states that Petitioner's assertions that NorthWestern "routinely acquires resources outside of the competitive solicitation process" is inaccurate because, with limited exceptions, all long-term term commitments of seven years or more have been through the competitive solicitation set forth in the Montana Rule. Thus, NorthWestern argues that Petitioners are not deprived of any opportunities to obtain a long-term future avoided cost rate.³⁹

3. Montana Consumer Counsel's Protest

22. Montana Consumer Counsel argues that, since it is for the states to determine what particular capacity is being avoided, the Montana Rule does not fail to implement PURPA.⁴⁰ Montana Consumer Counsel further argues that any cause of action relating to the Montana Rule arose over twenty years ago when the rule was placed into effect in 1992, and that the Petition should therefore be dismissed on limitation grounds. With respect to Petitioners' characterization of the Montana Commission's order involving Whitehall Wind,⁴¹ Montana Consumer Counsel argues that other obstacles existed for Whitehall Wind that would have prevented a legally enforceable obligation, beyond the competitive solicitation process, including "site control, firm contract terms, and any economic or other analysis of the feasibility of its proposed project."⁴² With respect to the stay of Order No. 7199d pending appeal, Montana Consumer Counsel argues that the Commission's role under PURPA is not to review the exercise of procedural discretion

facility, the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load." *Id.* at 15 (citing *Ketchikan*, 94 FERC ¶ 61,293 at 62,062).

³⁸ *Id.* at 17 (citing *Southern California Edison Co.*, 70 FERC ¶ 61,215, at 61,677 (1995)).

³⁹ *Id.* at 20-21.

⁴⁰ Montana Consumer Counsel Protest at 10.

⁴¹ *In the Matter of the Petition of Whitehall Wind, LLC, for QF Rate Determination*, Docket No. D2002.8.100 (Montana Commission June 4, 2010) (Order No. 6444e).

⁴² Montana Consumer Counsel Protest at 12.

by a regulatory commission in a specific case.⁴³ Montana Consumer Counsel finally argues that sovereign immunity precludes federal administrative agencies of jurisdiction over claims against states and their agencies.⁴⁴

4. EEI's Protest

23. EEI argues that the primary responsibility for implementation of PURPA falls to the states and that the Commission should continue its policy of giving states wide latitude in implementing PURPA.⁴⁵ EEI opines that competitive bidding is a valuable method of determining avoided cost and states that the Commission has a history of supporting competitive bidding.⁴⁶ EEI stresses the importance of avoided cost, explaining that QF rates that exceed avoided cost will, by definition, harm consumers. EEI states that, while bidding is not the only way to determine avoided cost in compliance with PURPA, it is reasonable and appropriate.⁴⁷

5. NARUC's Protest

24. NARUC stresses that the Commission has previously acknowledged the efficiencies of determining avoided cost through competitive bidding.⁴⁸ NARUC explains that the frequency of competitive solicitations reflects the demand for future capacity. NARUC adds that in the absence of such solicitations, a zero capacity price is appropriately reflected in the short-term rates available to QFs over 10 MW.⁴⁹ NARUC also claims that the competitive solicitation process does not interfere with the possibility for negotiated agreements between utilities and QFs outside of the process.⁵⁰ Moreover, NARUC points out that a QF can initiate a proceeding against the utility before the

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 11-14.

⁴⁵ EEI Protest at 4-5.

⁴⁶ *Id.* at 6-9.

⁴⁷ *Id.* at 9.

⁴⁸ NARUC Protest at 4.

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 4.

Montana Commission where it could show irregularities in the utility's resource procurement process that discriminate against QFs.⁵¹

6. Petitioners' Answer

25. Petitioners respond that QFs are currently being harmed, pointing out that WINData has multiple proposed projects that are subject to the 50 MW installed capacity limit.⁵² Petitioners claim that NorthWestern uses the 50 MW installed capacity limit as leverage to extract contract concessions from QFs.⁵³ Petitioners claim that, in December, 2012, the Montana Commission concluded that NorthWestern needed wind capacity and that "wind capacity was worth five percent capacity value of the surrogate avoided resource."⁵⁴ Petitioners argue that NorthWestern overstated the amount of QF power in its portfolio in its protest.⁵⁵ Petitioners contend that, despite its decision in Order 6444e, the Montana Commission is not taking the position that QFs in excess of the standard offer threshold of 100 kW may obtain a LEO outside of the competitive solicitation process.⁵⁶ Petitioners also argue that the Montana Commission's reliance on *Bidding NOPR*, in which the Commission proposed a competitive solicitation method for implementing PURPA, is questionable, contending that the proposed rule is vastly different from the Montana Rule and also point out that it was withdrawn and never adopted by the Commission.⁵⁷

B. Discussion

1. Procedural Matters

26. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2013), the notice of intervention and timely, unopposed interventions serve to make the entities that filed them parties to this proceeding.

⁵¹ *Id.* at 5.

⁵² Petitioners Answer at 9-10.

⁵³ *Id.* at 26.

⁵⁴ *Id.* at 29-30 (citing Order 7199d).

⁵⁵ *Id.* at 35.

⁵⁶ *Id.* at 41-42.

⁵⁷ *Id.* at 50.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2013), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept Petitioners' answer because it has provided information that assisted us in our decision-making process.

2. Commission Determination

28. Section 210(h)(2)(B) of PURPA⁵⁸ permits any electric utility, qualifying cogenerator, or qualifying small power producer to petition the Commission to act under section 210(h)(2)(A) of PURPA⁵⁹ to enforce the requirement that a state commission implement this Commission's regulations. As the Commission stated in its 1983 Policy Statement,⁶⁰ we have discretion in choosing whether to exercise that enforcement authority under section 210(h)(2)(A) of PURPA. We may choose to exercise our enforcement authority, or, where the Commission refuses to bring an enforcement action within 60 days of the filing of a petition, under section 210(h)(2)(B) of PURPA, the petitioner may bring its own enforcement action directly against the state regulatory authority or non-regulated electric utility in the appropriate United States district court.⁶¹

29. The Commission also can and sometimes does issue a declaratory order in response to an enforcement petition.⁶² That declaratory order, issued separate from the Commission's authority under PURPA's section 210(h) enforcement regime, is within

⁵⁸ 16 U.S.C. § 824a-3(h)(2)(B) (2012).

⁵⁹ *Id.* § 824a-3(h)(2)(A).

⁶⁰ *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,645 (1983) (1983 Policy Statement).

⁶¹ In those circumstances where the Commission refuses to act, the Commission may intervene as of right in an enforcement action brought by such a petitioner. 16 U.S.C. § 824a-3(2)(B) (2012).

⁶² *See, e.g., Rainbow Ranch Wind, LLC*, 139 FERC ¶ 61,077 (2012); *Morgantown Energy Associates*, 139 FERC ¶ 61,066 (2012), *denying reconsideration*, 140 FERC ¶ 61,223 (2012); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 (2011) (*Cedar Creek*); *Southern California Edison Co.*, 70 FERC ¶ 61,215, *order on reconsideration*, 71 FERC ¶ 61,269 (1995).

the Commission's discretion to issue an order "to remove uncertainty."⁶³ A notice of intent not to act and an accompanying declaratory order represent both the Commission's exercise of its discretion on such an enforcement action, as well as a statement of the Commission's position on the matter. The statement of position by the Commission, in a case where, as here, the Commission decides not to go to court on behalf of petitioners can provide assistance to a court on the Commission's thinking in the event that the petitioners decide to bring enforcement cases.⁶⁴

30. In this order, we give notice that we do not intend to go to court to enforce PURPA on behalf of Petitioners; Petitioners thus may bring their own enforcement action against the Montana Commission in the appropriate United States district court. Notwithstanding our decision not to go to court to enforce PURPA on behalf of Petitioners, we elect to also issue a declaratory order finding that the 50 MW installed capacity limit and the Montana Rule are inconsistent with PURPA and the Commission's regulations under PURPA.

31. The Commission's regulations require that a utility purchase any energy and capacity made available by a QF.⁶⁵ Under section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power "as available" or at a forecasted avoided cost rate pursuant to a legally enforceable obligation.⁶⁶ In Order No. 69, the Commission explained that the "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility."⁶⁷ Moreover, the Commission stated in *JD Wind 1, LLC* that:

⁶³ See 5 U.S.C. § 554(e) (2012); 18 C.F.R. § 385.207(a)(2) (2013).

⁶⁴ *Industrial Cogenerators v. FERC*, 47 F.3d 1231, 1234-35 (D.C. Cir. 1995) (comparing a declaratory order to "a memorandum of law prepared by the FERC staff in anticipation of a possible enforcement action; the only difference is that the Commission itself formally used the document as its own statement of position"); see also *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997).

⁶⁵ 18 C.F.R. § 292.303(a) (2013).

⁶⁶ 18 C.F.R. § 292.304(d) (2013).

⁶⁷ *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,880 *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part*

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[A] QF has the option to commit itself to sell all or part of its electric output to an electric utility. While this may be done through a contract, if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA.³⁴ Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.⁶⁸

32. In *Grouse Creek*, the Commission found that the Idaho Commission's requirement that a QF file a meritorious complaint to the Idaho Commission before obtaining a legally enforceable obligation "would both unreasonably interfere with a QF's right to a legally enforceable obligation and also create practical disincentives to amicable contract formation."⁶⁹ Similarly, we find that requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation particularly where, as here, such competitive solicitations are not regularly held.⁷⁰

& vacated in part sub nom. *Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

⁶⁸ *JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009) (internal footnotes omitted) (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 212 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250, at PP 136-137 (2007), *aff'd sub nom. Am. Forest and Paper Ass'n v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008)); *accord, Cedar Creek*, 137 FERC ¶ 61,006, at P 32 (2011).

⁶⁹ *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, at P 40 (2013) (*Grouse Creek*).

⁷⁰ Although the Montana Commission contends that its competitive solicitation requirement "is not contrary to PURPA for the simple reason that the Commission would not have proposed such an approach itself in its *Bidding NOPR* were it contrary to PURPA," *see* Montana Commission Answer at 14, the *Bidding NOPR*'s proposed competitive solicitation methods and requirements were never adopted by the Commission in that rulemaking proceeding, and thus have no relevance here. *See Regulations Governing Bidding Programs*, 64 FERC ¶ 61,364 (1993).

(continued...)

33. The Montana Rule is therefore inconsistent with PURPA and the Commission's regulations implementing PURPA to the extent that it offers the competitive solicitation process as the only means by which a QF greater than 10 MW can obtain long-term avoided cost rates. The Montana Rule creates, as well, a practical disincentive to amicable contract formation because a utility may refuse to negotiate with a QF at all, and yet the Montana Rule precludes any eventual contract formation where no competitive solicitation is held. Such obstacles to the formation of a legally enforceable obligation were found unreasonable by the Commission in *Grouse Creek*, and are equally unreasonable here and contrary to the express goal of PURPA to "encourage" QF development.⁷¹

34. Lastly, we find that the 50 MW installed capacity limit applicable to purchases from wind QFs larger than 100 kW but equal to or below 10 MW is inconsistent with PURPA and the Commission's regulations. NorthWestern acknowledges that it must purchase all energy from wind QFs, stating that the 50 MW installed capacity limit affects only the rates that certain wind QFs may receive. But, if the 50 MW installed capacity limit is met, wind QFs larger than 100 kW but equal to or below 10 MW are precluded from selling under Option 1(c), leaving these QFs with three options under Electric Tariff Schedule No. QF-1: Options 1(b), 2(a), and 2(b).⁷² Option 1(b) is a fixed-

Additionally, even if for the sake of argument the *Bidding NOPR* was considered relevant (and, as just noted, we believe that it is not), beyond noting that the *Bidding NOPR* proposed using competitive solicitations, the Montana Commission does not set forth how the specifics of its process align with the specifics of the proposal made in the *Bidding NOPR*, including, for example, whether, in Montana, QFs are given the opportunity to satisfy NorthWestern's capacity needs; whether the competitive solicitation is all-source bidding (including demand response) that treats QFs comparably; whether NorthWestern is permitted to negotiate to acquire electric capacity and associated energy outside the competitive solicitation while that solicitation is ongoing; whether the solicitation is transparent; and whether the Montana Commission has the ability and responsibility to certify, i.e., essentially review and approve, the final selections and prices that result.

See Bidding NOPR, FERC Stats. & Regs. ¶ 32,455 at 32,030-42. We also note that the *Bidding NOPR* proposed consideration of a 1 MW or below exemption from bidding requirements (while still allowing such QFs capacity payments). *Id.* at 32,043.

⁷¹ See 16 U.S.C. § 824a-3(a) (2012).

⁷² Montana Commission Answer at 7.

price, short-term, energy-only agreement of up to 18 months. Options 2(a) and 2(b) are agreements up to 25 years but with only variable, market based rates. Thus, when the 50 MW installed capacity limit is reached, wind QFs larger than 100 kW but equal to or below 10 MW cannot obtain forecasted avoided cost rates, which is inconsistent with the Commission's regulations, which entitle a QF with a legally enforceable obligation to rates that, at the QF's option, are forecasted avoided cost rates.⁷³ Also, once reached, the 50 MW installed capacity limit effectively precludes wind QFs greater than 100 kW but equal to or below 10 MW from receiving compensation for capacity.

35. NorthWestern argues that the 50 MW installed capacity limit is supported by the Commission's decision in *Ketchikan*, which stated that "an avoided cost rate need not include capacity unless the QF purchase will permit the purchasing utility to avoid building or buying future capacity."⁷⁴ In *Ketchikan*, however, the Commission explained that avoided cost rates need not include the cost for capacity in the event that the utility's demand (or need) for capacity is zero. That is, when the demand for capacity is zero, the cost for capacity may also be zero. Applying *Ketchikan* to the case at hand, the installed capacity limit should represent the point at which NorthWestern's demand for capacity equals zero. However, neither the Montana Commission nor NorthWestern has established that a 50 MW installed capacity limit has any clear relationship to NorthWestern's actual demand for capacity, therefore the *Ketchikan* rationale does not apply. For the foregoing reasons, we find that the 50 MW installed capacity limit is inconsistent with PURPA's goal of promoting QF development and fails to implement the Commission's regulations requiring an electric utility to purchase any capacity which is made available from a QF, and at a rate that, at the QF's option, is a forecasted avoided cost rate.

36. In conclusion, we find that the Montana Rule and the 50 MW installed capacity limit are inconsistent with PURPA and the Commission's PURPA regulations.

The Commission orders:

(A) Notice is hereby given that the Commission declines to initiate an enforcement action under section 210(h)(2)(A) of PURPA.

⁷³ 18 C.F.R. § 292.304(d)(2) (2013) (providing that rates, at the QF's option, can be based on "[t]he avoided costs calculated at the time the obligation is incurred.").

⁷⁴ *Ketchikan*, 94 FERC at 62,062.

Docket No. EL13-73-000, *et al.*

- 19 -

(B) The Commission hereby finds that the Montana Rule and the 50 MW installed capacity limit are inconsistent with PURPA and the Commission's PURPA regulations, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

EL13-73-000.DOCX.....1-19